BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	
	)	

PETITION FOR RECONSIDERATION OF

CENTER FOR MEDIA EDUCATION
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE

Sharon L. Webber
Angela J. Campbell
Citizens Communications Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for CME et al.

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SUMMARY

CME seeks reconsideration of that portion of the Commission's Order adopting rules for leased commercial access. As the Commission acknowledges, the issue of leased access did not receive a great deal of attention in this proceeding, and the rules should be understood as a starting point. Nonetheless, even when viewed as a starting point, it is clear that the rules adopted will not result in the diversity and competition that Congress intended leased access to provide.

Specifically, CME objects to the use of the highest implicit access fee as the maximum reasonable rate. This rate simply mirrors the cable industry's monopsony rents which have distorted current implicit fees. The sample rate calculations included in the Order demonstrate that access rates will be too high to attract programmers. Moreover, the Commission's assumption that cable operators will negotiate with would-be lessees for lower rates ignores reality.

Likewise, the use of only three programming categories contributes to establishment of rates prohibitive to most lessees. The rules require lessees to pay the highest rate in their category, even though they may face very different economic situations. The Commission should also clarify how "home shopping" rates will be determined. CME is concerned that "home shopping" rates may be the lowest, with the result that such services would displace other programming contributing more to diversity and the public interest.

The Commission's decision to establish high rates appears to be based on an erroneous interpretation of the statute. By establishing the highest implicit fee to avoid any adverse effect on cable operators, the Commission fails to implement Congress' later

amendment of section 612 to promote competition. This reading conflicts with well-established canons of statutory construction. Moreover, there is no evidence that adoption of a lower rate would undermine the viability of a cable system, and to the extent that lower rates might cause migration of existing programmers, the Commission has an alternative means of preventing migration.

The Commission's rules, require non-profits to pay the same rates as any commercial programmers in the "all others" category. CME estimates that it would cost over $400 million per year to lease a channel on a national basis. This amount, which is almost seven times the annual budget of the National Audubon Society, is clearly not affordable for non-profits. Thus, the Commission has no basis for its claim that its rate scheme "reduces the need to specify any preferential rates for not-for-profit organizations." CME urges that

CME also asks the Commission to reconsider the dispute resolution procedures. Those procedures are unfairly stacked against lessees. For example, in the case of a rate dispute, the lessee is required to state facts showing that the cable operator is charging a higher rate than the highest implicit access fee for a comparable service. Yet, the Commission has made it impossible for a lessee to obtain such facts by treating the data upon which the cable operator relies to set rates as proprietary.

The rules also require that the complainant prove a violation by "clear and convincing" evidence. The Commission's imposition of this higher standard is based on an erroneous reading of the statute. The high evidentiary standard will encourage cable operators to act unreasonably, safe in the knowledge that lessees are unlikely to complain because of the difficulty in prevailing at the Commission. Even if the lessee files a complaint, the rules provide no certaintly that it will be resolved expeditiously.

Finally, given the tentativeness of its rules, it is crucial that the Commission adopt reporting requirements now, instead of waiting to complete yet another rulemaking proceeding. Without requiring cable operators to report data concerning leased access usage and rates, the Commission will be unable to assess the effectiveness of its rules in fulfilling the statutory objectives of section 612 to promote diversity and competition.

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TO: The Commission

Petition for Reconsideration

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, the Center for Media Education, the Association of Independent Video and Filmmakers, the National Association of Artists' Organizations, and the National Alliance for Media Arts and Culture (hereinafter collectively referred to as "CME") respectfully ask the Commission to reconsider its Report and Order in the above referenced proceeding regarding leased commercial access.

Congress' amendments to the leased access provisions of the 1984 Cable Act represent a second opportunity to make leased access into a genuine outlet for diverse voices. Unfortunately, by establishing high rates, declining to set key terms and conditions and by establishing dispute resolution procedures that are stacked against the complainant, the Commission has virtually assured that leased access channels will remain underutilized. CME urges the Commission to reconsider its rules to ensure that Congress's goals of increased competition and diversity are achieved.

I. Adoption of the Highest Implicit Access Fee Will Not Lead to the Increased Diversity and Competition the Commission Claims.

In section 612 of the 1984 Cable Act, Congress established a scheme to "assure access to cable systems by third parties unaffiliated with the cable operator, and thereby promote[ ] and encourage[ ] an increase in the sources of programming available to the public."[1] As reported in 1990 by the Commission itself, that scheme was unsuccessful in fulfilling the congressional goal of increased diversity. 1990 Cable Report, 5 FCC Rcd 4962, 4973 (1990). One of the chief reasons Congress cited for the failure of leased access was that the rates were unreasonably high.[2] In 1992 Congress amended the 1992 Cable Act and directed the Commission, inter alia, to set maximum reasonable rates.[3]

The Commission has responded by setting the maximum reasonable rate as the highest implicit fee. Order, ¶ 515-17. By succumbing to the cable operators' pressure to adopt the highest implicit access fee as the maximum reasonable rate, the Commission undermines the intent of Congress and allows cable operators to continue their nine year pattern of

A. The Commission Should Reconsider Its Adoption of the Highest Implicit Access Fee As the Maximum Reasonable Rate.

The Commission claims that using the highest implicit access fee as the maximum reasonable rate will:

> automatically lower the starting point for negotiations for a substantial number of potential programmers who are not in the same programming classifications as those paying the highest implicit fee . . . . [U]nder these conditions, interest in the use of the leased access market will rise because rates will be low enough to entice programmers, particularly in the programming classifications with the lower implicit fees, to use leased commercial access.

Order, ¶ 521. The Commission provides no basis for its conclusions, and in fact, the evidence suggests otherwise.

The highest implicit access fee simply mirrors the cable industry's current monopsony rates which have distorted current implicit fees. Indeed, the Commission itself states that the highest implicit access fees are "derived from the highest market value of channel capacity for the system." Order, ¶ 519. Clearly, the "highest market value" under monopsony conditions when no true market exists is not a "maximum reasonable rate" and will not result in rates sufficiently low to entice programmer to use leased access.

The Commission itself seems to recognize that the highest implicit access fee will preserve, rather than remove, the monopsony element in rates. The Commission states that:

> Notwithstanding the possible existence of a monopsony relationship between the operator and the programmer paying the maximum, the amount paid or otherwise foregone by any unaffiliated programmer would nevertheless substantiate a maximum value of at least that amount for channel capacity.

Order, ¶ 519. This statement makes no sense. Is the implication that monopsonies do not distort prices and therefore monopsony pricing provides a reliable basis for regulation? CME asks the Commission to clarify how the maximum reasonable rate it establishes can be

reasonable if it reflects the continuing monopsony power of the cable operator.

The examples provided in the Order show that rates will be too high to "entice programmers" to use leased access. The Commission's sample computation of an "all others" highest implicit rate produces the figure of $0.50 per subscriber per month. Order at n. 1312. Using this figure, if an educator in Philadelphia wishes to lease a full-time channel reaching all of the cable subscribers in that television market, the charges would amount to over $11 million annually. ($0.50 x 12 x 1,875,610 = $11,206,200). CME has, in fact, calculated that a more plausible per subscriber fee is $0.60, resulting in a charge of over $13 million.[4] Either figure is far more than most education institutions or other actual or would-

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[4] Under the Commission's highest implicit rate methodology, the monthly charges for leasing a full-time cable channel on the basic tier will of course vary from system to system. The $0.60 per subscriber per month figure is a "rule of thumb" based upon a hypothetical, but reasonably representative, cable system. The subject system has 45 channels, including five pay channels and two pay-per-view channels (for a total of seven unregulated channels), and a single basic tier serving 20,000 subscribers with 38 regulated channels consisting of six commercial broadcast must-carry signals, one public TV must-carry, two PEG channels, and 29 satellite channels. (This is a generally representative system profile. According to the 1993 edition of the Television and Cable Factbook, less than 6% of cable systems have more than 20,000 subscribers or more, but they serve approximately 64% of cable subscribers. Approximately 54.86% of cable systems have between 30 and 53 channels; they serve 59.89% of subscribers. A single basic tier is also typical, based upon the fact that there were well over 50 million cable subscribers as of November 11, 1992, but only slightly more than 12 million expanded basic subscribers. See Factbook, Cable Systems volume, pp. F-3, F-4.)

Applying the Commission's subscriber rate benchmarks to this hypothetical system, we find that the per-channel rate is $0.618 per channel per month. See Order, Att. A, p.A-8. There is no deduction for payment to a programmer in this highest implicit rate calculation, since the public TV must carry signal is without cost to the cable operator. There is no per-subscriber adjustment, as all customers will receive the leased access channel. Reflecting the approximate nature of these calculations, CME rounds the monthly per-subscriber leased access channel charge from $0.618 to 0.60 per subscriber per month.

The effect of using the subscriber rate benchmarks is to exclude equipment costs and

be programmers can afford to pay for access.

The Commission may believe that using the highest implicit access fee as the maximum reasonable rate will result in increased leasing because it assumes that lessees will be able to negotiate rates below the maximum. Order, ¶ 519. This assumption ignores the argument previously made by CME that the maximum rate will become the de facto minimum rate. See CME Reply Comments at 5. Lessees have no good alternative; they will therefore be forced into paying the highest possible rate. In addition, cable operators have no incentive to agree to rates lower than those required by the rules if the only way a lessee can get relief is by proving by clear and convincing evidence that the cable operator has violated the Commission's rules. See infra, at IV(B). Thus, there is no basis for the Commission's conclusion that there will be a "lower starting point for negotiations," and that lessees will be able to negotiate rates below the maximum established by the FCC. Order, ¶ 521.[5]

The Commission's conclusion that cable operators will negotiate for lower rates also ignores the fact that programmers seeking access on leased access channels are doing so because their programming was rejected by the cable operator. As the Senate Report states:

> The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interest were similar, the operator would have been more than willing to carry the programmer on regular cable channels.[6]

The chances are slim that the cable operator would negotiate below the maximum with a would-be lessee whose programming cable operator did not want to put on in the first instance. It is crucial, therefore, that in adopting a maximum reasonable rate that the Commission not rely, in any way, on the possibility that lower rates will be negotiated.

In sum, the Commission's use of the highest implicit access fee will not increase diversity and competition, but rather will preserve the monopsony rents that have distorted implicit fees. The sample computations provided by the Commission itself show that the rates will be too high for most programmers. CME's calculations reveal that the rates will in fact be even higher. Moreover, because the cable operators have no incentive to negotiate with would-be lessees for lower rates, the highest implicit fee will be the de facto minimum rate.

B. The Commission Should Reconsider Its Adoption of Three Programming Categories.

The Commission's adoption of the highest implicit access fee is particularly troubling given its adoption of only three programming categories. First, combining full time pay

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manipulate implicit access fees to the disadvantage of lessees.

[6] S. Rep. No. 138, 102d Cong., 1st Sess. 31 (1991) ("1991 Senate Report").

channels with pay per view ("PPV") usage can lead to absurd results. For example, assume cable system X carries a two-hour PPV championship prize fight, which is priced at $35 with a 50-50 revenue split between the programmer and operator. The PPV fight is bought by 10% of the system's subscriber base, producing an implicit rate of $1.75 per subscriber for two hours. ([$35.00 - 17.50] x .1 = $1.75. or $0.875 per subscriber per hour). Shortly thereafter, an unaffiliated programmer seeks to lease a full time channel for a pay television service intended to compete with HBO. Since there are approximately 730 hours in the average month, the prospective lessee is quoted a lease rate of $638.75 per basic subscriber

Home shopping networks typically pay cable operators explicit rates consisting of a percentage of their sales within the cable operator's territory. These explicit rates will most likely be far lower than rates that would be set under a highest implicit rate formula. If current home shopping explicit rates are adopted by the Commission as the basis for leased access charges, there is a strong likelihood that most or all leased channels will be occupied by home shopping networks. Such a development would displace other programming that contributes more to diversity and the public interest, thereby defeating the core purpose of leased access.

As described supra, at 2, CME believes that the Commission should reconsider its system for determining maximum reasonable rates. However, assuming that the Commission retains that highest implicit rate pricing, CME asks that it clarify that home shopping leasing rates will consist of the "all other" rate plus the highest explicit fee paid by a home shopping channel on a given system.

Overall, the Commission's use of three programming categories will not produce rates that are consistent with the financial ability of most would-be lessees. There is an additional concern that rates in the home shopping category will be so low that home shopping networks will displace many other types of programming. The Commission should

the operation, financial condition or market development of' cable systems." Order, ¶ 515, citing § 612(c)(1). In so doing, the Commission ignores the 1992 amendment of section 612(a) to include the purpose of promoting competition. The 1992 amendment to § 612(a) creates an apparent conflict with § 612(c)(1) because if the cable operator faces competition as a result of leasing to a competitor, as intended by Congress, the cable operator is bound to experience some reduction in monopoly profits, which arguably could be considered an "adverse affect."

The Commission's decision to reconcile the inconsistent language in favor of the cable operator by adopting the highest implicit access fee as the maximum reasonable rate defeats congressional intent to promote diversity and competition. The Commission can achieve these goals, despite the "no adverse affect" language, by applying the relevant canons of statutory construction.

It is a well-established canon of statutory construction that the "mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act." Sutherland, Statutory Construction § 22.30 (4th ed. 1985).[7] This presumption that amendatory acts change the original act suggests that the Commission must make positive changes in its regulations. Another general canon of statutory construction suggests that a statute should always be construed in conformity with its purpose. Overseas Education Association v. FLRA, 876 F.2d 960 (D.C.Cir. 1989).

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[7] The Supreme Court has recently reaffirmed this canon of statutory construction in American National Red Cross v. S.G. and A.E., 112 S.Ct. 2465 (1992). In finding that a 1947 amendment to the National Red Cross charter made federal jurisdiction clear, Justice

Here, the Commission must reconcile the "no adverse effect" provision with Congress's recent amendments and set maximum reasonable rates so as to promote competition. Adoption of the highest implicit access fee as the maximum reasonable rate will not promote competition because as discussed above, the rates are too high and continue to reflect the monopsony position of the cable operator. Congress clearly did not amend the leased access provision to ensure that the cable operators could continue to derive monopsony rents. Rather, Congress wanted the leased access provision to serve as a "safety valve for anticompetitive practices." 1992 Senate Report at 32. Thus, it is not necessary to adopt the highest implicit access to implement the law. Indeed, to do so would violate the 1992 amendments and legislative intent to promote competition.

In addition, there is no evidence that the cable operators need such rents to survive. Leasing 10-15% of its capacity to programmers is a comparatively minor sideline to the cable operator's overall business. The additional programming on leased access channels will in fact add value to the cable operator's entire system. Subscribers generally will not distinguish between programming on leased channels and those on operator-controlled channels. This will produce revenues to the cable operator through increased penetration while the operator also reaps payments from channel lessees. There is thus no basis for the cable operators' assertion that anything less than the highest implicit access fee will adversely affect them. Order, ¶ 507.

Finally, the cable operators argued that adopting anything below the highest implicit access fee would adversely affect cable operators by causing migration. The Commission fails to consider that any adverse effect from migration could be eliminated by barring

migration. See CME Comments at 33; CME Reply Comments at 5. The Commission should bar migration as a means to ensure that the cable operators are not adversely affected.

In deciding to use the highest implicit access fee to ensure that cable operators suffer no adverse effect, the Commission erroneously interprets the statute. In doing so, the Commission fails to implement congressional intent to promote competition and thus preserves the monopsony rates of the cable operators. In addition, by ignoring CME's argument that the Commission should bar migration, the Commission fails to consider a

pay the same rate as a commercial programmer falling within the "all others" category. As the example above described, see supra at 4, a local non-profit programmer in Philadelphia that wanted to reach all of the cable subscribers in that market would have to pay over $11 million per year. These rates would be too high even for major national non-profit organizations. For example, the National Audubon Society's total operating budget for 1992 was $48,935,995. Using the FCC figure of $0.50 per subscriber, it would cost the Audubon Society approximately $336 million to reach all cable households -- almost seven times the Audubon Society's total operating budget.[8] These rates, in fact, exceed the $42 million annual federal funding budget for the purchasing and leasing of public telecommunications facilities. 47 U.S.C. § 391 (1993 Supp.).

Thus, the rates set by the Commission are clearly prohibitive for any non-profit. As CME argued in its comments, non-profits could be expected to afford only a nominal amount per subscriber. See CME Comments at 17.

The Commission also rejects the set-aside for non-profits proposed by CME. See CME Comments at 18. The Commission erroneously concludes that "adequate provision has been made for not-for-profits programmers under Section 611 of the Communications Act." Order, ¶ 526. As CME pointed out in its comments, local franchises are not required to provide Public, Educational and Governmental ("PEG") channels and most franchises do not provide PEG channels. See CME Reply Comments at 16. Moreover, even if the franchise does provide for PEG channels, most non-profit programmers will not qualify for use of a

[8] Nationwide there are over 56 million households with cable television. CABLEVISION, Jan. 27, 1992 at 52. (56 million x .50/subscriber x 12/mos. = 336 million).

PEG channel. Id.

In sum, the Commission should reconsider its decision not to adopt lower rates for non-profits and to provide a temporary set aside. The highest implicit access fee in the "all others" category is surely too high for any non-profit. Lower rates for non-profits are necessary to ensure that Congress' goal to promote diversity is achieved. A set-aside would also increase the likelihood that channel space will be available for non-profits.

III. The Commission Should Reconsider Its Decision Not to Establish Reasonable Terms and Conditions of Use.

In an attempt to ensure the future success of leased access, Congress amended the 1984 Cable Act to help place potential lessees on a more level playing field with the cable operators. Accordingly, Congress mandated that the Commission "establish reasonable terms and conditions." § 612(c)(4)(A)(ii). As directed by Congress, the Commission has established certain terms and conditions governing leased access.

CME commends the Commission for its decision not to permit cable operators to impose higher technical standards for lessees than those an operator may require for PEG

Commission should reconsider its decision not to set a maximum reasonable rate for billing and collection, as required by statute. § 612(c)(4)(A)(i). The Commission concludes that "cable operators will have the incentive to quote reasonable competitive rates in order to obtain additional revenues that billing and collection services would generate for them." Order, ¶ 505. However, the Commission itself recognizes that "the record now before us contains little specific data on the existence of competitive providers of billing and collection services for leased access programmer, or on the likelihood that a competitive market for these services will develop in the future." Order, ¶ 504. Where no competition exists, the cable operator has no incentive to charge competitive rates and indeed, has an incentive to charge higher rates if it views the lessee as a competitor or otherwise would prefer not to put the lessee on its system. Thus, regulation of those rates is appropriate.

The Commission should likewise reconsider its decision that "channel placement or tier access is a matter that is best left in the first instance to negotiation between the parties." Order, ¶ 498.[10] In declining to establish terms regarding channel placement, the Commission observes that "unlike core PEG channels, Congress did not mandate specific tier location for leased access and did not require that leased access be carried on basic service." Order, ¶ 498. The statute, however, requires that the Commission "establish reasonable terms and conditions for such use." § 612(a)(4)(A)(ii). Moreover, the legislative history indicates that Congress intended that one of the terms to be established by the Commission

[10] The Commission's use of the phrase "in the first instance" is ambiguous. Does this mean that there is a "second instance," or that the Commission might intervene at some point? How will the Commission assess reasonableness with the absence of regulation? See infra at 21. CME urges the Commission to clarify its intent.

was channel placement:

> if programmers using [leased access] channels are placed on tiers that few subscribers access, the purpose of this provision is defeated. The FCC should ensure that these programmers are carried on channel locations that most subscribers actually use.

1991 Senate Report at 79. Thus, to fulfill Congressional intent, the Commission must establish reasonable terms and conditions involving channel placement.

The Commission should also clarify how it will address the reasonableness of the time of day at which a cable operator offers channel capacity.[11] The Commission erroneously concludes that "operators and leased access providers [will] negotiate in good faith on this issue." Order, n. 1283. As explained supra at 5, cable operators have no incentive to negotiate with potential lessees and Congress found that they have a long record of failing to do so. 1992 House Report at 39. The success of leased access will be undermined if the cable operator is given full authority to place programming at any time it wants. For example, cable operators could lease part-time channel capacity only during hours in the middle of the night.

Other terms and conditions established by the Commission require clarification. First, in agreeing with cable operators that they should have the discretion to require reasonable security deposits, Order, ¶ 501, the Commission fails to define "reasonable." Defining this term is particularly important given the Commission's agreement with Cox that

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[11] CME also urges the Commission to reconsider its decision not to establish guidelines for the length of leases. This is important to lessees who may have to raise large amounts of capital to operate. Raising large amounts of capital will be difficult if the lessee is granted only short-term leases. CME urges the Commission to require operators to lease channels for the length of time proposed by the lessee -- up to a maximum of 15 years. See CME Reply at 31.

its "rules should strive to preserve the financial integrity of the operator." Id. If the security deposit is too high, it can create a barrier to entry and defeat the purpose of the leased access provision.

Second, the Commission concludes that because section 612(d) provides that a court reviewing an access complaint must disregard "any price, term or condition established between an operator and affiliate for comparable services," the Commission is likewise "precluded from establishing rates, terms and conditions for leased access based on transactions with an affiliate." Order at n.1294. This interpretation is not supported by either the plain language of the statute, Congressional intent, or common sense. By its terms, section 612(d) applies only to the federal courts -- not the Commission. Moreover, such comparison is precluded only in the context of adjudicating a specific complaint, not in adopting rules establishing reasonable terms and conditions. It would seem that the Commission must look to such arrangements to understand the economics of the industry and to be sure lessees are treated fairly.

It is just as important for the Commission to establish reasonable terms and conditions as it is to set maximum reasonable rates. Even if a lessee can somehow afford the highest implicit access fee, its success may be circumvented by unreasonable terms and conditions. In leaving key terms and conditions to be negotiated, the Commission merely replicates the earlier system -- the very same system that resulted in the minimal use of leased access channels and that caused Congress to amend the leased access provisions. To ensure that the leased access provisions increase diversity and competition, the Commission should reconsider its decision not to establish reasonable terms and conditions for channel placement

and part-time leasing and should clarify the other points discussed above.

IV. The Commission Should Reconsider the Procedures for the Resolving of Disputes.

Congress directed the Commission to "establish procedures for the expedited resolution of disputes concerning rates or carriage." § 612(c)(4)(A)(iii). The Order, adopts rules requiring petitions to be filed within 60 days of the alleged violation. Order, ¶ 533. After the lessee files a complaint, the cable operator has 30 days to respond. Id., ¶534. If the Commission finds that the lessee has made out a prima facie case, the cable operator might be required to submit additional information. Id. Even if the lessee has made out a prima facie case, the Commission will not grant relief unless the lessee can show "by clear and convincing evidence that the cable operator has violated [the Commission's] leased access rules or otherwise acted unreasonably or in bad faith." Id., ¶535.

The Commission claims that these procedures will "ensure that complaints are timely, thus guarding against determinations based on a stale record, and to forestall development of patterns of abuse." Id., ¶ 533. The Commission also asserts that its procedures provide for the "streamlined resolution of leased access disputes." Id., ¶ 534. CME supports the Commission's goals of protecting against a pattern of abuse and streamlining resolution of disputes. The rules the Commission has adopted, however, will not accomplish these goals.

A. The Commission Fails to Grant the Lessee Access to the Data Needed To Make a Complaint Regarding Rates

The rules require that a petitioner "state concisely the facts constituting a violation of [the Commission's] leased access rules." Id., ¶534. Thus, in the case of a dispute over rates, the lessee would need to state facts showing that the cable operator was charging more than the highest implicit fee it charged for a comparable category of service. Yet, it appears

that the Commission is treating the data upon which a cable operator relies to set the maximum reasonable rate as proprietary under 47 C.F.R. § 0.459. Order at n. 1314. Moreover, the Commission's statement that rates will be easily verifiable by regulators, or by mediators in an ADR proceeding, Order, ¶ 522, suggests that all parties will have access to such information except the complainant. Without such data, it will be virtually impossible for the lessee to make out a prima facie case, much less to prove a violation by clear and convincing evidence. We ask that the Commission require that cable operators place in their public file all documentation in support of their rate schedules.

In United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Court reversed and remanded a similar FCC decision that put the burden on the complainant while simultaneously preventing the complainant from obtaining the information needed to make out a prima facie case. There, the Commission had eliminated the requirement that radio stations keep a programming log of all nonentertainment programming. The programming logs had served for many years as the only means for citizen groups to obtain "concrete information necessary to demonstrate a radio station's inadequate performance in a petition to deny" a license renewal. Id. at 1441. The Court expressed disbelief that "the Commission would simultaneously seek to deprive interested parties and itself of the vital information needed to establish a prima facie case." Id. at 1442.

Here, the Commission's decision not to grant the lessee access to the information upon which it will have to base its complaint is equally beyond belief. For leased access to be viable, the Commission must require that lessees have adequate information to determine whether rates charged by a cable operator are reasonable, and to make out a prima facie

complaint, if the lessee believes the rates are not reasonable.

B. The Commission Should Reconsider Its Decision to Require Lessees to Show a Violation by Clear and Convincing Evidence.

In the NPRM, the Commission had proposed that the establishment of a prima facie violation of Commission rules would rebut the presumption that prices, terms and condition of leased access are reasonable. 8 FCC Rcd 510, ¶ 166 (1992). If the allegations set forth in the petition were then proven, "they would constitute clear and convincing evidence of unreasonable practices or rates and meet the burden of proof imposed under the Act." Id. Assuming that the lessee has access to the information needed to make a prima facie case, this approach is legally sound

In its Order, however, the Commission rejects this proposal. Rather, the Commission concludes that even if the lessee has made out a prima facie case, it will still be required to prove by clear and convincing evidence that the cable operator has violated the Commission's rules. The Commission places this burden on the lessee on the ground that "there is no indication that Congress intended to change the burden of proof set forth in Section 612(f) of the Act, and our procedures do not change this statutory burden." Order, ¶ 535.

This reading of section 612(f) is erroneous. Section 612(f), a provision which was part of the 1984 Cable Act, provides that:

> In any action brought under this section in any Federal district court or before the Commission, there shall be a presumption that the price, terms, and conditions for use of channel capacity. . . are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.

In passing the 1992 Cable Act, however, Congress directed the Commission to "determine the maximum reasonable rates" and "establish reasonable terms and conditions" for leased

access. § 612(c)(4)(A)(i)-(ii). Applying the traditional canons of statutory construction, the effect of this amendment is to eliminate the presumption that the rates and terms set by the cable operators are reasonable.[12]

Prior to Congress' amendment of the leased access provisions, a cable operator's rates, terms and conditions were presumed reasonable, and a lessee could only rebut the presumption by showing by clear and convincing evidence that the cable operators price, terms or conditions were unreasonable. The need to rebut, however, applies only if there is a presumption. Because with the 1992 amendments, there is no longer a presumption that the cable operator's rates, terms and conditions are reasonable, there is no longer any need for the lessee to show anything by clear and convincing evidence. Instead, the Commission should employ the evidentiary standard it usually applies in addressing complaints.

The Commission's decision to place a heavier evidentiary burden on the lessee is additionally troubling given the Commission's statement that

> [i]f an operator's rates, or terms and conditions of use for leased access are proved by clear and convincing evidence to violate our leased access rules or regulations, which rules establish what is or is not reasonable conduct, this would fulfill the complainant's burden of proof within the meaning of Section 612(f).

Order at n.1357 (emphasis added). The rules adopted by the Commission, however, do not

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[12] Where provisions of a statute are in conflict, the agency should give effect to the most recent provision. See supra at 9. Indeed, the Commission has implicitly done this in the case of sections 612(d) and (e)(1). These sections require that an aggrieved person first bring an action in federal district court and only seek relief at the Commission upon a showing of prior adjudicated violations. Congress did not delete these sections when it amended the law in 1992. Nonetheless, without discussion, the Commission interprets 612(c)(iii)'s direction that it establish procedures for the expedited resolution of disputes as overriding the requirement that aggrieved parties first seek relief in federal court.